Claim No. 7942 of 2008

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

FIRST WITNESS STATEMENT OF MARY NELL BROWNING

I, **Mary Nell Browning**, consultant to Baupost Capital, LLC (together with the investment entities that it manages) (**Baupost**) of 10 St James Ave, Suite 1700, Boston, MA 02116, United States, will state as follows:

Introduction

1. Since 1 April 2014, I have been a consultant to Baupost where my role includes advising on a significant portfolio of claims (of many hundreds of millions of US dollars) against Lehman Brothers International (Europe) (in administration) (**LBIE**) which Hutchinson Investors, L.L.C. (**Hutchinson**) acquired from certain funds managed by my former employer, GLG Partners L.P. (**GLG**). Hutchinson is the third respondent to these proceedings. I make this statement in my capacity as consultant to Baupost and I am duly authorised to do so.

2. Prior to commencing my consultancy with Baupost, I was employed by GLG where my role was to manage the Lehman exposure of various funds managed by GLG. My employment with GLG commenced in January 2009 and so I have been involved with the administration of LBIE for a significant period of time.

3. Until 28 March 2014, I was also a representative of GLG European Long/Short Fund on the creditors' committee of LBIE and of a sub-committee (referred to as the

Claim Resolution Agreement Working Group) which the administrators of LBIE (the **Administrators**) consulted regarding the Claims Resolution Agreement (the **CRA**) referred to below. I make this statement, however, based on publicly available information and/or communications by the Administrators at meetings to which all creditors were invited (as further referred to below) and not on the basis of any confidential information which was disclosed to me as a member of either of the committees referred to above.

4. The purpose of this witness statement is to set out certain evidence relevant to some of the matters covered in the ninth and tenth witness statements of Anthony Victor Lomas (**Lomas 9** and **Lomas 10**), in particular in relation to the CRA, and to address certain matters which Lomas 9 and Lomas 10 do not cover. I wish to summarise my recollection and understanding of the background to, and the purpose of, certain provisions of the CRA dealing with Net Financial Claims (as defined in the CRA and further referred to below) and, in so doing, address the suggestion by Wentworth Sons Sub-Debt S.à r.l (**Wentworth**) at paragraph 171 of its position paper that the conversion into US dollars of all Close-Out Amounts (as defined in, and as calculated pursuant to, the CRA) pursuant to Clause 24.1 (*Conversion of Close-Out Amounts into US dollars*) of the CRA was for "administrative convenience" only.

5. In this regard, I am informed by Patrick McKee of Baupost that approximately three quarters of all Baupost's unsecured LBIE claims, and over 90% of their claims where the relevant counterparty acceded to the CRA, were denominated in US dollars prior to the CRA coming into effect. In light of the commercial purpose of the CRA (in the context of the events which led to its promotion), I do not believe that there was any intention on the part of signatories to release valuable rights in the form of non-provable claims either by acceding to the CRA or by subsequently executing a claims determination deed (**CDD**) and no statements were made by the Administrators to this effect. Whilst I understood that, for the minority of claims not already denominated in US dollars, the conversion provided for in Clause 24.1 of the CRA would necessarily have had the effect of modifying the currency in which the claims were denominated, there was no suggestion that such claims should be treated differently to existing claims in US dollars. I believe that this understanding is reflected in and supported by the background to the CRA proposals, and statements made by the Administrators, as set out below.

6. Terms capitalised but not otherwise defined in this witness statement have the meaning given to them in Lomas 9 and Lomas 10.

7. I believe the facts set out in this witness statement to be true from my own knowledge and/or on the basis of documents to which I refer, save where I state otherwise. Where I do not derive the facts stated from my own knowledge or from those documents, I state the source of any information and the facts are true to the best of my information and belief.

8. Attached to this witness statement marked **MNB1** is an exhibit containing copies of the documents to which I refer below. Except where otherwise indicated, references to page numbers and tabs below are to pages and tabs of exhibit MNB1.

US dollar claims against LBIE

9. At the time the CRA was proposed to creditors, I understood, based on my conversations with my former colleague Geoff Galbraith of GLG (at that time Head of Middle-Office Accounting and heavily involved with managing GLG's exposure to Lehman Brothers) regarding the claims of the GLG funds, that a very substantial amount of the assets and liabilities of LBIE were already in US dollars. This is supported by an analysis of Baupost's LBIE claims where approximately three quarters of all Baupost's unsecured LBIE claims, and over 90% of their claims where the relevant counterparty acceded to the CRA, were denominated in US dollars prior to the CRA coming into effect.

10. My understanding regarding the denomination of LBIE claims has recently been confirmed by a claims analysis that was carried out by the Administrators in the context of a consensual proposal for dealing with the surplus estate once all provable claims have been paid in full (the **Surplus Entitlement Proposal**). I understand that the Surplus Entitlement Proposal is currently on hold pending the outcome of this Application. The slides from a presentation to creditors on 10 March 2014 can be found at MNB1 pp. 001-029 and were published on the PwC website at http://www.pwc.co.uk/business-recovery/administrations/lehman/update-entitlements-to-surplus-28-march-2014.jhtml. In particular, I note at slide 7 (*3. Claims analysis*) that 78% of the claims against LBIE are denominated in US dollars (the notes provide that this analysis is based on LBIE's books and records for admitted claims and proofs of debt for claims not yet admitted) and slide 26 (*Claims*

by agreement type, currency and termination date – CRA) indicates that 100% of CRA claims are denominated in US dollars.

11. Slides 7 and 27 of the Surplus Entitlement Proposal (at pp. 007 and 027) also refer to US dollars as the "Lehman functional currency". I was informed by Geoff Galbraith that this approach was consistent with LBIE's practice prior to the administration of sending aggregated statements to the GLG funds (for example in relation to the total amount of client money that had been segregated for that fund) in US dollars.

Administrators' statements prior to the CRA Proposal

12. The Administrators first published their proposals (the **Proposals**) for achieving the purpose of the administration on 28 October 2008. These can still be found on the PricewaterhouseCoopers (**PwC**) website at http://www.pwc.co.uk/en_uk/uk/assets/pdf/lbie-proposals-28-oct-2008.pdf and a copy can be found at MNB1 pp. 030-077.

13. At section 5 (xi) of the Proposals (at p. 070), the Administrators proposed that:

> "the primary currency for the Administration will be US Dollars and funds will be maintained in US Dollars, (except to the extent that monies are needed to meet Administration expenses payable in other currencies or monies are held in trust for the benefit of a third party). The Administrators will require creditors **to submit their claims in US Dollars and dividends will be paid in US Dollars** [*own emphasis*] in the chosen exit route from the Administration".

14. When the Administrators first wrote to creditors asking them to provide details of their claims on an online portal that had been created for this purpose, the Administrators stated that "**Claims should be entered in the database only in US $** [*own emphasis*]. The appropriate currency conversion table to be used for transactional data in other currencies is included in the User Guide in the database". A template of this letter to creditors is still on the PwC website at http://www.pwc.co.uk/en_uk/uk/assets/pdf/lbie--counterparty--final-version--cover-letter.pdf and a copy can be found at MNB1 pp. 078-085. The statement referred to above is at p. 083.

15. I understand from my former colleague Geoff Galbraith at GLG that, at the time of the Proposals, GLG was concerned about the adverse movement of the US dollar against sterling and the suggestion that, in that particular economic climate, the Administrators should be converting any non-US dollar assets into US dollars. I suspect that the same concern was shared by other LBIE creditors. As a result, after the initial creditors' meeting convened to consider the Proposals, a modification to the Proposals to replace proposal (xi) was published as follows (the **Revised Proposals**):

> "The Administrators will maintain all funds in the estate **in the currencies in which such assets have been realised** [*own emphasis*]. The Administrators' strategy as regards the selection of an appropriate currency for maintaining estate funds, pending determination and implementation of the appropriate "exit route" will be determined in consultation with the creditors' committee."

16. The Revised Proposals were circulated to creditors via a letter dated 27 November 2008 which can be found on the PwC website at http://www.pwc.co.uk/en_uk/uk/assets/pdf/lbie--agreed-proposals.pdf and at MNB1 pp. 086-088.

17. The first two progress reports in relation to the administration were published in April 2009 and October 2009 respectively. These were the only two progress reports that were available to creditors at the time the CRA was proposed. The two progress reports can be found at MNB1 pp. 089-181 and 182-247 respectively and on the PwC website at http://www.pwc.co.uk/en_uk/uk/assets/pdf/lbie-progress-report-140409.pdf and http://www.pwc.co.uk/en_uk/uk/assets/pdf/lehmans-2nd-progress-report-141009.pdf. In both progress reports, all figures were stated in US dollars. At p. 174, the first progress report states:

> "For convenience we have aggregated the receipts and payments into a single reporting currency, US Dollars. As detailed in the receipts and payments account realisations are held in a number of currencies and the aggregation is for reporting purposes only."

18. In July 2009, the Administrators applied for directions in connection with a proposed scheme of arrangement under Part 26 of the Companies Act 2006 (the **Proposed Scheme**). The Proposed Scheme was intended to return trust assets to the beneficial

owners but also to determine the amount of unsecured claims of creditors. A summary of the principal terms and effect of the Proposed Scheme can be found at MNB1 pp. 248-333 and on the PwC website at http://www.pwc.co.uk/assets/pdf/lehman-mini-es-140709v2.pdf. In Part 9 (*Other Terms*), paragraph 41 (*Currency*) at p. 278, the Proposed Scheme stated:

> "**The Scheme will operate in US dollars** [*emphasis added*]. All calculations and valuations between the Scheme Creditor and LBIE under it will be made in US dollars. If any amount is determined in currency other than US dollars, such amount will be converted to US dollars at the exchange rate on the date of valuation or when such amount falls to be determined. Where LBIE has converted Money into a different currency from that of receipt (the Initial Conversion), the claim will be converted into that different currency at the actual rate of exchange used to effect such Initial Conversion."

19. Unfortunately, the High Court, and subsequently the Court of Appeal, found that it did not have jurisdiction to sanction a scheme of arrangement compromising proprietary rights but there was nothing in the court decisions to suggest that the provisions in the Proposed Scheme dealing with unsecured claims could not be replicated by the Administrators in a revised scheme (or other appropriate distribution mechanism).

The CRA proposal

20. It is against this backdrop that Clause 24.1 of the CRA needs to be considered. As is stated at paragraph 18 of Lomas 10, when the Proposed Scheme failed, the Administrators focused instead on a consensual, contractual mechanism for returning trust property and for determining the amount of unsecured claims as the Proposed Scheme had sought to do. As the Administrators stated in an update to clients that can be found at MNB1 pp. 334-341 and on the PwC website at http://www.pwc.co.uk/business-recovery/administrations/lehman/lehman-client-assets-update-051009.jhtml:

> "The Contractual Solution would have substantially the same provisions as the draft Scheme, including a bar date, and deal with all aspects of determining the value of a creditor's net equity, the allocation and distribution of trust property that are dealt with under the draft Scheme. This

Contractual Solution has many benefits, in that the key terms have been substantially developed (with the draft Scheme) and that it does not, in itself require court sanction. All consenting creditors would agree to be bound between themselves and LBIE by the Contractual Solution".

21. The proposed consensual, contractual mechanism led to the CRA. Given that the terms of the CRA were based on those of the Proposed Scheme, it came as no surprise to me that the CRA would, for all claims (including the minority of claims not already denominated in US dollars) provide, as part of the modified rights conferred on a creditor, for a right to be paid a US dollar sum reflecting the Close-Out Amounts (as defined in the CRA) – just as the Proposed Scheme had proposed that it would operate in US dollars. Indeed, as was subsequently evidenced by the Surplus Entitlement Proposal, the fact that the majority of claims against LBIE were already denominated in US dollars meant that the provisions of Clause 24.1 would not have an economic impact on the majority of claims and, for those claims that were not already denominated in US dollars, the conversion to US dollars would benefit the estate as further discussed below.

Commercial purpose of the CRA

22. My understanding of the main features of the CRA (and what it was seeking to achieve) is consistent with the description given in the slides to a presentation to the Managed Funds Association (**MFA**) and the Alternative Investment Management Association (**AIMA**) in New York (on 8 October 2009) and in London (on 9 October 2009). I did not attend those meetings but the slides can be found on the PwC website at http://www.pwc.co.uk/assets/pdf/lehmans-mfa-aima-presentation-9oct.pdf and at MNB1 at pp. 342-375.

23. In summary, just as the Proposed Scheme had been, the CRA's primary purpose was to provide a mechanism for regulating the return of trust assets. In order to achieve this objective, the CRA operated as a contractually binding agreement (to which a particular counterparty had to agree to accede) between LBIE and the counterparty incorporating substantially all the terms of the Proposed Scheme including:

    (a) a bar date by which counterparties had to accede to the CRA in order to crystallise the claimant population;

(b) terms dealing with the *pro rata* allocation of shortfalls where LBIE was holding insufficient securities of a particular type;

(c) provisions regarding the costs of managing and returning trust assets; and

(d) provisions dealing with the distributions of any assets that LBIE might recover from Lehman Brothers Inc (**LBI**).

24. However, in order to return trust property to a counterparty, the Administrators needed to establish whether that counterparty owed any amounts to LBIE so that they could establish the counterparty's "net equity" (which was the expression used by the Administrators to mean the counterparty's entitlement to any trust assets once sufficient assets had been appropriated by LBIE to cover the counterparty's liabilities). Therefore, it was proposed in the slides referred to above that the CRA would also contain provisions to "determine the financial position payable between LBIE and Clients" (p. 355). Given that it might not be known, in advance, whether a particular counterparty was a net creditor or a net debtor of LBIE, it was not possible for the CRA to contain provisions relating to the valuation of liabilities without also containing provisions relating to the valuation of claims.

25. This led to the provisions referred to in paragraph 29 below. My understanding of those provisions, based on their commercial purpose (which I understood to be to allow the Administrators to appropriate sufficient trust assets to cover any financial liabilities so that surplus trust assets could be returned) was that they were intended to reflect the economic substance of the underlying financial contracts but subject to certain overriding valuation principles also referred to below. It was also necessary, however, for all claims and liabilities to be calculated in a single currency (to allow for netting across close-out amounts under different financial contracts and to enable the Administrators to appropriate client assets "matching" any Net Financial Liability). Given that the majority of the assets and liabilities of LBIE were denominated in US dollars, the obvious choice of such common currency was US dollars.

26. For the vast majority of claims, the conversion anticipated by Clause 24.1 was irrelevant. Although the CRA modified contractual entitlements by providing that Close-out Amounts would be denominated in US dollars, in the majority of cases, claims under financial contracts were already so denominated, and so Clause 24.1

would have no impact. Where the CRA was intended to vary or modify contractual rights, this was very clearly spelt out (see, for example, the Overriding Valuation Provisions in Clause 20.4).

27. In the minority of cases where the underlying claim was not already denominated in US dollars, I understood the intended effect of Clause 24.1 to be to modify the contractual rights so that the claim was so denominated with all the necessary and incidental consequences of that modification. The CRA did not indicate anywhere, and it was not my understanding, that such claims should be treated differently to existing US dollar claims once the conversion had taken effect.

Town hall meetings to consider terms of CRA

28. The Administrators convened two "town hall" meetings to discuss the terms of the CRA with LBIE counterparties, one in New York on 7 December 2009 and one in London on 11 December 2009. I was present on 11 December 2009 in my capacity as a member of the Claim Resolution Agreement Working Group. The slides for the meeting in London can be found at MNB1 pp. 376-427.

29. At that meeting, it was made clear to potential signatories that there were provisions in the CRA that were intended to determine and agree the amount of unsecured claims of CRA signatories. In particular, at slides 16-17 at MNB1 pp. 391-392, counterparties were told that the CRA would:

    (a) provide for the automatic termination of any "open" contracts at the end of the month in which the counterparty acceded to the CRA. I understood that this was to deal with the fact that (i) some agreements did not contain provisions allowing the counterparty to terminate in the event of an administration of LBIE and (ii) some counterparties were choosing, for whatever reason, not to terminate their agreements;

    (b) enable the Administrators to treat certain defective termination notices as if they were effective;

    (c) contain certain valuation provisions to enable the close-out amounts under certain contracts to be determined. As referred to above, my understanding of the purpose of these provisions was to allow LBIE to appropriate trust assets equal to any Net Financial Liability which might be determined pursuant to

these provisions. In broad terms, the valuation provisions would follow the close-out provisions, if any, in the underlying contract (and would provide for overriding valuation provisions if none were contained in the contract in question) but subject (in the event of conflict) to certain overriding provisions of the CRA. For example, claims in respect of "short" asset positions (i.e. assets that a client had borrowed from LBIE, therefore resulting in a claim of LBIE against the client) or "rehypothecated" assets (i.e. assets that had been held in custody for a client by LBIE but where LBIE had exercised a right of use in respect of that asset, therefore resulting in an unsecured claim of the client against LBIE) were to be valued as at 12 September 2008, being the last business day before the date of administration and the last date on which LBIE had produced statements for clients;

(d) provide for the conversion of all close-out amounts into US dollars (using an exchange rate as at the date of administration). This is the key provision with which this statement is concerned; and

(e) allow for the set-off of any "negative" close-out amounts against any "positive" close-out amounts, so as to result in a net figure which might be either an amount owing to LBIE (a **Net Financial Liability**) or an amount owing by LBIE (a **Net Financial Claim**).

30. Counterparties were also told that, in the event that the CRA determined that there was a Net Financial Liability, there would be various ways in which the counterparty could reduce or discharge the amount of that liability by exercising certain "collateralisation elections" under the CRA. So, for example, client money claims or proprietary claims to assets sub-custodied with LBI could be used to collateralise a Net Financial Liability. I understood, based on various conversations with Geoff Galbraith and other GLG colleagues involved with managing GLG's exposure to LBIE, that one of the primary reasons why the Administrators had chosen to re-denominate close-out amounts in US dollars was that client money and assets sub-custodied with LBI were usually denominated in US dollars and so it would make it easier for the Administrators to "match" the collateral with the liability.

31. If and to the extent that the Net Financial Liability was not collateralised, counterparties were told that the Net Financial Liability would accrue interest at the

rate specified in the CRA. I have referred below to the provisions in the CRA regarding interest on any Net Financial Claim.

32. When considering the purpose of the valuation provisions in my role as an employee of GLG (a significant creditor of LBIE), my understanding was that such provisions were intended to preserve the underlying economics of the contracts in question to the extent possible, and insofar as consistent with the purpose of the CRA. Although there were certain overriding valuation principles in the CRA (such as the valuation of short and rehypothecated assets as at 12 September 2008) and certain provisions aimed at remedying any defects in the underlying contracts (for example, where the termination or close-out provisions in those contracts were not clear), I have no recollection of counterparties being told at the town hall meeting that they would be giving up any significant (and potentially valuable) rights under their contracts by entering into the CRA. Given the very tight timeframe that counterparties were given to consider the CRA (less than a month from the date of the town hall meetings to the final date for accession), if the Administrators had been intending to release non-provable claims, I would have expected them to draw to people's attention any such significant variations or modifications of their contractual rights as a result of acceding to the CRA (as the Administrators did with the overriding valuation principles and the provisions converting close-out amounts to US dollars). However, there was no reference to the fact that the CRA (or, as I note below, any CDD that might subsequently be entered into) might compromise a signatory's non-provable claims. For example, I would have expected such a significant impact to be mentioned on slide 48 (at MNB1 p. 423), dealing with the benefits to signatories of the CRA. No such reference is made.

33. I note that, at the time the CRA was being proposed, the possibility of LBIE having sufficient assets to pay all of its provable debts in full was not in contemplation. Thus, for example, the second progress report states at MNB1 p.232 that the Administrators were unable to provide an estimate of the unsecured dividend at that time due to material uncertainties regarding the quantum of asset recoveries and the level of unsecured creditor claims.

Provisions of CRA and supporting documents

34. I was involved in causing certain of the GLG funds to accede to the CRA based on the information then made available to creditors by the Administrators, as well as certain CDDs (see further paragraph 38 below).

35. Given that the CRA was a lengthy and complex document and potential signatories were only given a limited period of time to consider its terms, there were certain supporting documents that were sent to potential signatories at the same time as the CRA was circulated, seeking to explain how the terms of the CRA operated. These were in addition to the town hall meetings discussed above. In particular, there was:

    (a) a letter from the Administrators to Eligible Offerees (as defined in the CRA) (the **Letter**). This can be found at MNB1 pp. 428-459;

    (b) a reader's guide to the CRA which was prepared by the Claim Resolution Agreement Working Group (the **Reader's Guide**). This can be found at MNB1 pp. 460-476; and

    (c) a summary of the principal provisions and effect of the CRA prepared by Linklaters LLP (the **Summary**) This can be found at MNB1 pp. 477-542.

36. Certain statements contained in these supporting documents also led me to understand that, while contractual claims were being modified in the ways described in the town hall meetings and the supporting documents, the intention was to preserve the underlying economics of the financial contracts in question to the extent possible, and insofar as consistent with the purpose of the CRA, and that no contractual rights (other than the ones discussed below) were being affected or given up.

The Letter

37. Paragraph 4.3 (*Other Claims under Financial Contracts*) of the Letter states that the CRA "establishes a mechanism for the termination and close-out of all Financial Contracts" between a signatory and LBIE. In the event that the provisions result in a claim against LBIE, the Letter states that "this will be an ascertained unsecured claim against [LBIE] for the purposes of any future distribution from the general estate of [LBIE]". However, the Letter does not state that this is the only attribute of the net claim, nor does it state that any ancillary rights (such as non-provable claims) would

be lost by entering into the CRA. No statements were made to me at the time which indicated this might be the case.

38. In paragraph 5(ii) (*Advantages of accepting the offer*) of the Letter, the Administrators express their view that the CRA will benefit signatories on the basis that (among other things) it will provide "finality and certainty regarding the financial position between Signatories and [LBIE]". My understanding in this regard was that the finality and certainty sought was regarding the quantum of claims arising from Financial Contracts.

39. Finally, at the end of paragraph 5, the Administrators state their general view that the CRA "is in the best interests of the creditors of [LBIE] as a whole". My understanding was that the Administrators were recommending and encouraging creditors to enter into the CRA and that, by so doing, were not suggesting that the effect of the CRA was to deprive creditors of any entitlements other than those clearly identified.

The Reader's Guide

40. The introduction to the Reader's Guide states that the "principal focus" of the CRA is to facilitate the return of trust assets to those signatories with ownership claims. However, it also states that the CRA "contains mechanisms to determine the claims of those Signatories with purely unsecured claims". As set out above, my understanding of the purpose of these provisions was that they were to allow LBIE to appropriate trust assets if the valuation mechanism showed that the counterparty owed a Net Financial Liability to LBIE. A significant number of GLG funds were "Eligible Offerees" for the purposes of the CRA, and together with considering the impact on the funds' proprietary interest in trust assets, I also had to keep in mind (on behalf of those funds) the impact of the CRA on the general unsecured claims (or liabilities) arising out of the close out of financial contracts under the CRA.

41. Paragraph 2.2 (*Unsecured Claims*) refers to the valuation of rehypothecated long positions as of the last business day prior to the date of administration (i.e. 12 September 2008). It also states that "Financial Contracts that have been closed out will be valued based on the close-out amounts determined in the manner set out in the contracts". I understood this to mean that the CRA was intended to preserve the economics of the underlying agreements to the extent possible, and insofar as was

consistent with the purpose of the CRA. Although paragraph 2.2 goes on to state that the CRA "sets out different methodologies to be used in determining the value of the close-out amounts under these financial contracts", there was nothing in these methodologies which suggested to me that any non-provable aspects of the contractual claims under the financial contracts were in any way waived or released.

42. Paragraph 2.4 (*Net Contractual Position*) explains that, if "the Signatory has more claims than liabilities, it will have a net financial claim against [LBIE] (that will ultimately entitle the Signatory to a portion of the dividend to be paid by [LBIE] to its unsecured creditors)". This statement made sense to me as an entitlement to a dividend is one of the characteristics of an unsecured claim. However, there is nothing in the Reader's Guide that suggested to me that this entitlement to a dividend is the only entitlement that a signatory would receive in respect of its Net Financial Claim or that it would be deprived of any entitlements that necessarily flow from, or are ancillary to, having a Net Financial Claim. There was no indication from the Administrators at the time that I was required to consider whether certain GLG funds should accede to the CRA that there would be any such loss of entitlements to ancillary economics.

43. Paragraph 4.7 (*Part 7 – Contractual Position*) provides further detail as to the purpose and effect of Part VII of the CRA. It states that, under the CRA, "all open financial contracts (for example, derivatives, repurchase agreements etc.) will have to be terminated in order for [LBIE] to determine that client's net contractual position," which explains the purpose of the provisions terminating open contracts at the end of the month in which the signatory accedes to the CRA. It also states that "[t]he principal goal is to have the valuation methodology set forth in the financial contract determine the close-out amount subject to certain overriding valuation principles including that the valuation of rehypothecated securities and short positions are to be valued as at the date prior to administration". Again, this suggested to me that the intention was to preserve the underlying economic terms of the financial contract (including provisions in respect of default interest) to the extent possible, and insofar as consistent with the purpose of the CRA, and I based my decision on whether or not GLG should accede to the CRA on that understanding.

44. Paragraph 4.7 also makes clear that "[c]lose-out amounts will be converted into US dollars as at the date of the administration". For the reasons given in paragraph 43 above, this choice seemed to me to be a logical one, particularly if the majority of

claims were already denominated in US dollars so that this provision of the CRA would have no impact on such claims. For claims that were not denominated in US dollars, this clause would have an impact but my understanding, based on what the Administrators had said at the town hall meeting and my conversations with my former colleague, Geoff Galbraith, regarding the denomination of the majority of client money and LBI asset claims, was that this was considered to be for the benefit of the estate as a whole (including to assist with the exercise of collateralisation elections).

45. Finally, paragraph 4.7 also deals with the question of interest on any Net Financial Claim or Net Financial Liability. On the former, the Reader's Guide states that "[i]n accordance with standard insolvency rules, trust creditors will not be entitled to any interest in respect of their claims against [LBIE] including with respect to close-out amounts under open financial contracts". This statement was made at a time when there was not expected to be any surplus once all provable debts had been paid in full. There was no suggestion in paragraph 4.7 that the "standard insolvency rules" were being modified in any way.

The Summary

46. The Summary does not contain any provisions that affected my understanding as set out above. Relevant provisions include:

(a) paragraph 22.2 (*Open contracts and automatic termination*) which provides that any "open" Financial Contracts will be automatically terminated on the last business day of the month in which the signatory accedes to the CRA;

(b) paragraph 22.3 (*Close-Out Amount*) which provides that Close-Out Amounts (as defined in the CRA) will be expressed in, and converted to, US dollars;

(c) paragraph 22.9.1(vii) (*Overriding Valuation Provisions*) which states that "no interest will accrue on any unpaid liability of [LBIE] from the Administration Date, save to the extent that such interest would accrue under Rule 2.88 of the Insolvency Rules". I am informed by my legal counsel and believe that Rule 2.88 provides for interest at the higher of the rate applicable to the debt apart from the administration and 8% per annum simple. It was certainly not my intention or understanding, when causing certain of the GLG funds to accede to the CRA, that those funds would give up their right to claim interest at the

rate applicable to their debts apart from the administration if this rate was higher than 8%; and

(d) paragraph 22.11 (*Interest*) which deals with the interest that accrues on the uncollateralised portion of the Net Financial Liability but says nothing about interest on a Net Financial Claim.

47. For the reasons given above, I do not consider that it was intended, by the Administrators or CRA signatories, that the CRA should deprive signatories of the non-provable aspects of their contractual claims (including Statutory Interest or any Currency Conversion Claim that might arise as a result of re-denomination of those contractual claims in US dollars). No such intention was ever communicated to me by the Administrators and no statements to this effect were made to those who attended the town hall meeting in London. Indeed, it is not clear to me how the Administrators could have concluded that the CRA would benefit signatories (and was in the best interests of creditors of LBIE), and could have encouraged creditors to sign up to its terms, if the CRA had had this effect. I certainly did not understand this to be the intended effect of the CRA.

CRA CDDs

48. In March 2014, I was responsible for agreeing 30 CDDs which various GLG funds entered into with LBIE. 13 of these CDDs were entered into by GLG funds which had acceded to the CRA. I note that, of these 13 CDDs, 10 stated the "Agreed Claim Amount" in US dollars. One such CDD (with the name of the relevant fund and the Agreed Claim Amount redacted for confidentiality reasons) can be found at MNB1 pp. 543-574.

49. The purpose of this particular CDD was to agree the quantum of the claim against LBIE (in the Agreed Claim Amount) but without determining whether such claim was an unsecured claim or a client money claim. I understand that the Administrators would specify the Agreed Claim Amount in the currency in which the contractual claim was denominated in these circumstances. Given the provisions in Clause 24.1 of the CRA, it came as no surprise to me, therefore, that the Agreed Claim Amount was specified in US dollars in this CDD (and in the other 12 CDDs that were of this type).

50. On the same day, the funds that had entered into this type of CDD also executed a supplemental agreement pursuant to which:

(a) the fund in question assigned its rights to any client money claim to Laurifer Limited, a special purpose vehicle incorporated by LBIE for this purpose; and

(b) the Administrators agreed to admit the fund's claim, as an unsecured claim, in the amount specified in the agreement (the **Converted Agreed Claim Amount**). The amount specified was in sterling. I note that, although certain undertakings were given in this agreement in respect of the client money claim, there are no waivers or releases in respect of the unsecured claim.

51. An example of such a supplemental agreement (with the name of the relevant funds and the Converted Agreed Claim Amounts redacted for confidentiality reasons) can be found at MNB1 pp. 575-581.

52. As for why the funds entered into two separate agreements on the same day (rather than entering into a CDD in which the relevant fund was given an admitted unsecured claim), this was purely for administrative convenience. At the time the CDDs had been negotiated, it was not clear whether all the funds would assign their client money claims to LBIE's nominee. Although the decision was subsequently taken to do so, it was easier to use the form of CDD that had been negotiated (with a supplemental agreement dealing with the client money assignment) rather than using a different form of CDD.

53. The other three CDDs that were entered into by GLG funds that had acceded to the CRA had the effect of agreeing the amount of the asset shortfall claim (i.e. the unsecured claim arising from LBIE's not having sufficient securities of a particular stockline to return those securities in full). The Agreed Claim Amount in these three CDDs was stated in sterling.

54. All 13 CDDs executed by GLG funds that had acceded to the CRA contained language similar to that found at Clause 2.6 of the CDD at pp. 553:

> "Nothing in this Deed shall (i) prevent the Creditor from asserting a Currency Conversion Claim; (ii) operate as a discharge or release of a Currency Conversion Claim if any such claim exists; or (iii) constitute an

acknowledgement by the Company of the existence (as a matter of law or fact) of any Currency Conversion Claim."

55. I understood that this language had been included in the CDDs for the avoidance of any doubt given the issues that had been raised in the proceedings that have become known as "Waterfall 1". I did not consider that this language was necessary (or that, without it, the Currency Conversion Claim might be waived or released) and no statements were made to me by LBIE or the Administrators to this effect. Furthermore, at no stage did either LBIE or the Administrators indicate to me that, without this language, there might be a substantive difference depending on whether the GLG funds entered into a CDD specifying the Agreed Claim Amount in sterling or the underlying contractual currency.

Statement of Truth

I believe that the facts stated in this witness statement are true.

Signed .....

Mary Nell Browning

Dated this 31 day of October 2014

Claim No. 7942 of 2008

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION)

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

EXHIBIT MNB1 TO THE FIRST WITNESS STATEMENT OF MARY NELL BROWNING

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
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